Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-295

EDWARD LEE HICKS and
DELTA DISTRIBUTING COMPANY, INC.
Petitioner

v

UNIROYAL, INCORPORATED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 27, 1976

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

EDWARD LEE HICKS and
DELTA DISTRIBUTING COMPANY,
A Texas Corporation,
Petitioners,

v.

UNIROYAL, INCORPORATED,
A Delaware Corporation,
Respondent.

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 29, 1976.

OPINIONS BELOW

The affirmance (per curiam - no opinion under Fifth Circuit Rule 21) of the United States Court of Appeals, not reported, appears in the Appendix to this petition. The judgment of the District Court dated June 9, 1976, appears in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1976. The petition for rehearing was denied on June 9, 1976. This Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a party or parties to an illegal tie-in contract with the defendant should be denied standing to recover damages under the federal antitrust laws for the loss in value of their business resulting from the continued existence (five years) of the illegal contract because the actual purchase of the products from the defendant under the contract were made by entities owned, controlled, or franchised by the parties-plaintiff.

2. Where an appeal involves a claim within the exclusive jurisdiction of the federal courts which federal public policy favors private enforcement, and which involves one of the largest suppliers in the United States of a given product and a major marketing group, whether it is appropriate for a Court of Appeals to dispose of the appeal from the granting of defendant's motion for directed verdict predicated upon alternative grounds of lack of standing and the substantive absence of some of the elements of an antitrust tie-in violation without written opinion or indeed any indication whatsoever of the basis of the affirmance.

CONDITIONALLY PRESENTED

3. Whether an antitrust tie-in violation was shown for purpose of directed verdict on either of two theories:

(1) Because of the making a five year contract which obligated the plaintiff Delta Distributing and other members of the Delta group to purchase 75% of the Delta tires from Uniroyal wherein Uniroyal, the manufacturer, offered uniquely desireable contract terms for one product (the existing or old line of tires and tying product) upon the condition that the plaintiff in order to obtain the benefit of such terms, accept the onerous contractual provisions regarding another product (the new line of tire and the tied product).

(2) Because of the making of an amendment to the five year contract wherein the manufacturer (Uniroyal) tied the sale on a formula price basis of new lines of tires (the price of which was not specified in the 1969 contract) with a price increase beyond the 1969 contract terms on the old lines of tires (the price of which was specified in the 1969 contract).

STATEMENT OF THE CASE

Petitioners Hicks and Delta Distributing instituted suit under the federal antitrust laws against respondent Uniroyal seeking money damages based upon the tie-in violations of section 1 of the Sherman Act and section 3 of the Clayton Act. At the close of the Plaintiffs' (Hicks and Delta Distributing) case, the trial court granted Uniroyal's motion for directed verdict predicated upon alternative grounds of lack of standing and no tie-in violation. On Appeal the Fifth Circuit affirmed without opinion pursuant to its Rule 21.*

Uniroyal is a major manufacturer and supplier of tires in both the original equipment market and for private brands in the replacement market. The Plaintiffs Delta Distributing and Hicks were members and shareholders of the Delta Tire Corporation group. The twenty-two indiviudal members of this group purchased tires manufactured from Uniroyal, and to a much lesser extent, from other tire manufacturers under various Delta private brand names that were owned by Delta Tire Corporation. All of such tires manufactured by Uniroyal were bought and sold directly to the individual members and not to Delta Tire Corporation, which acted merely to coordinate orders. The Plaintiffs' purchases were made through Delta Distributing by various entities owned or controlled by Hicks or by sub-franchising as authorized by Hicks and Delta Distributing. The total dollar sales of purchases by or through the members of Delta, including Plaintiffs, were the

* Set out p. 16 infra.

greatest of any private brand customer of Uniroyal. In terms of purchasing volume the Delta members were one of the largest private brand accounts in the United States.

The antitrust charges stem from the 1969 contract and the 1971 amendment governing the sale and pruchase of the tires between Defendant Uniroyal and the individaul members of Delta, including the Plaintiff Delta Distributing. Delta Tire Corporation was also a party to those agreements, but under the contract no tires were authorized to bought, sold, or shipped to it. Under the 1969 contract, Plaintiff Delta Distributing was obligated to purchase 75% of all of its Delta brand tires from Uniroyal including both the existing lines of tires at the price specified in the 1969 contract, and new lines at whatever price Uniroyal was willing to sell. If the Delta members did not agree to Uniroyal's price on the new lines, then the Plaintiff and other Delta members could be obligated to increase proportionately the purchases of the old lines, whether wanted or not, under the 75% clause. Uniroyal had insisted on the percentage requirement provisions so "that Delta will not be able to shop the prices." The existing or old lines and the new lines were recognized in the contract as two different products, and Plaintiffs offered evidence that the old lines and new lines were different and not fungible.

Shortly after the contract was executed, Uniroyal became dissatisfied with the profit it was making on the old lines under the 1969 contract price and threatened to substantially increase the price

of new lines (whose price was open-ended) in the 1969 contract) unless Plaintiff Delta Distributing and the other individual Delta members would agree to a price increase beyond the contract terms on the old lines. The result was the 1971 amendment by which Uniroyal agreed to sell the new lines on formula basis at more competitive prices.

The twenty-two members of the Delta group had franchises throughout the United States to which the tires purchased from Uniroyal were shipped. The Petitioners had had most of the Texas areas of 191 counties including Dallas.

Petitioners sought damages because of the decrease in value to their Delta franchise or membership as a result of the antitrust tie-in violations occasioned in the 1969 contract and the 1971 amendment between Uniroyal and the Plaintiff Delta Distributing. Prior to the tie in arrangment evidence was offered that Delta Distributing and Hicks' franchise was worth in excess of $1,000,000.00. Because of the tie-in contracts, testimony was offered that it decreased in value to $100,000.00 or less. No claim was made that Uniroyal had committed an antitrust violation against Delta Tire Corporation (the Coordinator of orders and owners of the Delta trademarks) and no claim of damage to the Petitioners was made on the basis of any injury to Delta Tire Corporation.

Uniroyal's Motion for Directed Verdict was predicated primarily upon the Petitioners' lack of standing because they were former shareholders of Delta Tire Cor-

poration, (the coordinators). The Motion however, also urged that there was no tie-in violation. The trial court expressly granted the Motion because of the lack of standing of Delta Distributing and Hicks, but also indicated, with some reservation, that the other grounds were sustained.

An appeal was duly perfected and the Fifth Circuit affirmed without opinion. A Petition for Rehearing was filed which expressly argued the need for the Court to indicate whether the affirmance was on the standing question or on some basis of the tie-in claim, and the inappropriateness in this case of a Fifth Circuit Rule 21 disposition. A copy of the Petition for Rehearing is set forth in the Appendix, infra. The Petition for Rehearing was denied, and this Petition for Certiorari filed.

REASONS FOR GRANTING WRIT

I. THE JUDGMENTS BELOW OF LACK OF STANDING CONFLICT WITH DECISIONS BY THIS COURT AND BY OTHER COURTS OF APPEAL.

The damages sought by Delta Distributing and Hicks, for which they claim standing, were predicated upon the diminished value of their Delta Tire distributorship, or franchise. The complaint alleged that prior to the illegal tie-in contracts the Plaintiffs had "a going business with a fair market value substantially in excess of $750,000.00 [and] as a result of its membership and participation in the 1969 contract, and as a result of the 1971 contract, plaintiffs' valuable business dimin-

ished to less than $150,000.00." At trial, witnesses placed the value of Delta Distributing's and Hick's 191 county Texas Delta Tire franchise in excess of one million dollars prior to the impact of the illegal tie-in contract with Uniroyal and a $100,000.00 or less afterwards.

As the owners of this Texas Delta franchise, it would seem that Delta Distributing and Hicks would have the requisite standing to sue for the injury to their property and diminishment of its value caused by the contract to which Delta Distributing was a party with Uniroyal. The value of Delta membership or franchise was the right to purchase Delta brand tires-a property right which had value and could be sold or assigned. Indeed, the Florida franchise, which was analagous to Hicks' Texas franchise, ahd been leased, prior to the alleged tie-in contract with Uniroyal for 20 years at $5,000.00 per month. Also, Delta Distributing and Hicks had sold subfranchises in Texas to Kent and Air Speed for a total of $75,000.00.

The illegal contracts between Delta Distributing and Uniroyal directly and adversely affected Delta Distributing's right to buy tires. Indeed that was the very purpose of the contracts. As a result of the tie-in, the right to buy Delta tires, which had been proved to be of value greatly diminished.

In the requested charge to the jury (filed prior to the granting of the directed verdict) damages were sought on the basis that "plaintiffs sold their business" and were "entitled as damages to the differ-

ence, if any, between fair market value of its business free of the restrictive practice of the tie-in violation...and the fair market value at the time of sale." (See Appellants' Brief p. 17).

The above basis of recovery of damage has been consistently recognized in federal antitrust actions by the Supreme Court and the Courts of Appeal. The denial of standing to seek such damages is in conflict with those decisions.

For example it was expressly recognized in *Story Parchment Co., v. Patterson Parchment Paper Co.*, 282 U.S. 555, that an injured party is entitled to recover for the loss in the value of a business resulting from an antitrust violation. As this Court noted, the "trial court submitted to the Jury for consideration only two items of damages . . .(2) the extent to which the value of Petitioner's property had been diminished as the result of such act [antitrust violation]." 282 U.S. at 561. Recovery on such basis was approved by the Court. 282 U.S. at 567.

Albrecht v. Herald Company, 452 F.2d 124 (8th Cir. 1971) involved the damages sustained by a contract carrier of a newspaper. Damages were allowed on the basis of difference between the fair market value of his business absent the antitrust violation and the actual sale price. "The damages referred to in the statute [15 U.S.C. §15] should be construed in the ordinary common law context as compensating plaintiff in full for the preventable and established loss sustained by reason of the defendant's proscribed acts. The

general rule in property damage cases. . . is "...liability of a party is limited to the difference in value between what plaintiff's property is worth and what it would be worth but for the fault of the defendant." 452 F.2d at 127-8.

In the above cases, the plaintiffs necessarily were found to have standing. If such plaintiffs have standing, the petitioners at bar have standing. Delta Distributing and Hicks are "buyers" on the basis of their contractual rights and obligations concerning Delta brand tires, but their business or property interests which are protected by the Sherman Act are not restricted to a damage formula predicated exclusively upon actual sales transactions.

As was true in *Perkins v. Standard Oil*, 395 U.S. 642, the Petitioners here were no mere bystanders that were hit but not aimed at: "It is clear in this case, however, that Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard." 395 U.S. at 649.

The principal thrust of Defendant Uniroyal's Motion for Directed Verdict, and the principal basis expressly relied upon by the trial court in granting the Motion* was that the Plaintiffs Delta Distributing and Hicks lacked standing to claim a tie-in violation by Uniroyal. To raise a valid

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*THE COURT: Gentlemen, I have reached the conclusion in this case that the Motion for Instructed Verdict must be sustained

tie-in question, as recognized in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958), the plaintiffs' case should be basically that there "was an agreement by a party to sell one product, but only on condition that the buyer also purchases a different (or tied) product." Thus, under *Northern Pacific*, if the Defendant Uniroyal assertedly agreed to sell the Plaintiff Delta Distributing one product, but only on condition that the Delta Distributing would also purchase a different (or tied) product, then Delta Distributing unquestionably would have *standing as plaintiff* to assert that this agreement with the Defendant Uniroyal is a tie-in violation. This situation is exactly what occurred in the case at bar. In this context the basis of the trial court's determination of no standing should be examined.

In its standing argument, Uniroyal has urged *Mendenhall v. Fleming Company Inc.*, 504 F.2d 879 (5th Cir. 1974), which the trial court found to be controlling. Plaintiffs Hicks and Delta Distributing have no quarrel with the holding in *Mendenhall* and the principles on which it is

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*continued
on the authority of *Mendenhall versus the Fleming Company*, 504 Federal 2d 879 and well -- that's the basic reason. And, I think the other valid reasons are advanced by the Defendants. I'm not so confident on those; that is, on the question of whether there was one product or two, whether there was an undesirable product, but I think that the basic reason in my thinking, among others, is the proposition raised by Mendenhall versus Fleming and I'm going to so hold.

based. *Mendenhall*, however, has no proper application to the case at bar. That case followed the well known rule that an individual shareholder or former shareholder of a corporation did not have standing to sue a party for consequential damages that allegedly had resulted from antitrust wrongs *committed against the shareholder's corporation*. Such suit must be brought by the corporation (or if the corporation refused, then a derivative suit might lie, in which event the corporation would be a party and would recover any damage award) as the corporation, not the shareholder is the victim.

Unlike *Mendenhall*, the plaintiffs in the case at bar were not seeking to recover damages for antitrust violations by Uniroyal which may have been committed against Delta Tire Corporation. In this respect Uniroyal's Motion for Directed Verdict on standing, upon analysis, was a masterpiece of successful confusion. This was accomplished because Plaintiff Delta Distributing, as one of the twenty-two members of the Delta group, held stock in Delta Tire Corporation. And, under the *Mendenhall* doctrine, Delta Distributing as a mere shareholder of Delta Tire Corporation could not recover damages based on a theory that Uniroyal had committed antitrust violations against Delta Tire Corporation. However, Delta Distributing and Hicks were not seeking any recovery predicated upon their capacity as shareholders of, and offered no evidence of any damage caused by antitrust injury to, Delta Tire Corporation. Likewise, Hicks was joined as co-plaintiff not because he was a shareholder of Delta Distributing, but because he controlled

the franchise rights of the Delta membership and had received the proceeds on the sales of the two sub-franchises.

Plaintiff Delta Distributing was a *party to both the 1969 contract and the 1971 amendment with the Defendant Uniroyal.* These two agreements (the '69 contract, Plaintiffs' Exhibit 5, and '71 amendment, Plaintiffs' Exhibit 2) *are the basis of the claimed illegal tie-in. As a direct result of those illegal tie-in agreements between the Defendant Uniroyal and the Plaintiff Delta Distributing, the Plaintiffs sought damages and maintain that they have the requisite standing.

Although the Fifth Circuit did not indicate its basis of affirmance, it seems unlikely it would have been taken in by Uniroyal's spacious argument that this was a shareholder suit that was controlled by the *Mendenhall* decision. Indeed at oral argument the thrust of the Fifth Circuit questions (See Petition for Rehearing, Appendix infra) was predicated on another argument advanced by Uniroyal, *viz*, that there could not be standing because the actual purchase of tires under the 1961 contract of the 1971 contract of the 1971 amendment between Uniroyal and Delta Distributing were not made by Delta Distributing or Hicks but by entities they controlled or franchised.

Hicks and Delta Distributing owned a property right by virtue of their power to buy Delta brand tires at contract prices,

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*Portions of the contract and amendment are set out in the appendix, infra.

and to buy Delta brand tires through the contractual rights. The value of this right to buy Delta brand tires, whether or not the tires are bought and sold by Delta Distributing or whether the right to buy is offered for sale to a sub-franchise so that it can buy and sell the tires, naturally depends upon the economic advantage in having the right to buy Delta brand tires.

II. THE APPROPRIATENESS OF AFFIRMING WITHOUT ANY INDICATION OF THE BASIS, A DIRECTED VERDICT IN ANY ANTITRUST CASE PREDICATED UPON BOTH LACK OF STANDING AND OF ANY TIE-IN VIOLATION SHOULD BE CONSIDERED UNDER THE SUPERVISORY POWERS

Because of the multiplication of cases in the federal appellate system that place the utmost strain upon our judicial system, it is most appropriate for this Court under its supervisory authority to give appropriate guide lines to the federal courts of appeal. This is essentail because Congress in exercising its authority under Article III of the Constitution has created inferior appellate courts and has provided a right of appeal to such tribunals. The Fifth Circuit, the most burdened of all of the circuits, has sought, as have some of the other circuits, to modernize the appellate process so that it can discharge its awesome responsibilities.

Fifth Circuit Rule 21 provides:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21, or "ENFORCED. See Local Rule 21."

The issues in this case do not come within the scope of Fifth Circuit Rule 21 (1),(2), and (3). In reference to Rule 21 (4), the constitutional issue of standing and legal issues under the Sherman Antitrust Act are of substantial public importance and would be of great precedential significance.

At the outset counsel for Petitioners would like to make it clear that not even a whisper of criticism is intended in reference to the fairness, integrity and consciousness of the Court below. Indeed as stated in the Petition for Rehearing

(Appendix, infra) the petitioners would state:

> (a) That Rule 21 is a fair and appropriate solution to the compelling need and urgency to resolve the problems which necessarily result from a staggering appellate case load; and (b) that Rule 21 affirmances are the result of the same careful judgment, review and consideration which is given to cases which are disposed of by opinion; and in particular that although this panel did not write an opinion, this panel fully and fairly considered the case, and indeed, not only adroitly questioned counsel at oral argument, but also allowed counsel to file a post argument brief for due consideration.

"The Appellants would, however, respectfully suggest that Rule 21 is not appropriate to the present case in which a directed verdict was granted in a federal antitrust case on the basis of standing and the merits of a tie-in violation, and in particular where the acknowledged authority for lack of standing is not applicable.

"Standing is, of course, a Constitutional requisite under Article III, and if standing fails, the Court has no jurisdiction to consider the merits of the claim as advisory opinions

> are also outside the purview of Article III Courts.

This Court has recognized the important public policy in favor of private enforcement of the antitrust laws. If this is so, the question of standing, a case significant issued in any proceeding, assumes particular policy important in antitrust matters. The nature of disposition below impairs the duties of this Court as well as depriving the petitioners and other private parties who might seek to enforce the antitrust laws. This Court uner its discretionary review can select only a few of the cases in which certiorari is sought. The task becomes increasingly difficult for the Court, as well as Petitioner where the legal basis of the decision below rests on an unknown premise. Petitioners have conditionally presented the question as to the merit of the antitrust claim, as the standing issue should be unequivocably resolved prior to comments on the merits.

III. (In reference to conditionally presented question No. 3)

THE JUDGMENT BELOW, IF BASED UPON NO TIE-IN VIOLATIONS, IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND COURTS OF APPEAL OF OTHER CIRCUITS

To establish a tie-in (essentially an agreement by a party to sell one product but only on the condition that the buyer also purchase a different, or tied, product) Petitioners pursued two bases. Evidence was offered to establish that the 1969 agreements with Uniroyal tied their purchase of the old lines of tires, the price of which was specified in the 1969 contract (the tying product) with the purchase of new lines of tires the price of which was not specified in the 1969 contract (the tied product). Evidence was offered that the lower prices on the tying product, the old lines, were especially desirable. The Petitioner also offered evidence to establish that on the 1971 amendment Uniroyal tied the purchase of the new lines on a formula basis and at a more favorable price (the tying product) with a substantial price increase on the old lines (the tied product). Evidence was offered that the new lines, on a better price basis than that threatened under the 1969 contract, were especially desirable, particularly because of the increasing demand for new lines which Plaintiff and the members had to buy mainly from Uniroyal because of the 75% clause. As a Uniroyal docuemtn stated: "Agreement provides for 75% by line or type which prevents them from giving us low

profit items and 'creaming' to the advantage of another supplier." "Another supplier" refers to a Uniroyal competitor. Besides evidence that Uniroyal possessed sufficient economic power in the tying market, evidence was also presented to show the anticompetitive effect in the tied market. It is apparently unquestioned that a substantial amount of interstate commerce was involved.

In Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969), the trial court had entered summary judgment for the defendant, and the Sixth Circuit affirmed without opinion. This Court, in reversing that decision and remanding for trial, noted:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. See, e.g., *International Salt; Northern Pacific; United States v. Loew's Inc.*, 371 U.S. at 45: "Even absent a showing of market dominance the crucial economic power may

be inferred from the typing product's desirability to consumers or from uniqueness in its attributes."

We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are "unique and unusual". We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitiors.[2] Since summary judgment in antitrust cases is disfavored, *Poller, supra*, the claims of uniqueness in this case should be read in the light most favorable to petitioner.

394 U.S. at 502-505.

Under the language of Fortner, that evidence created a sufficient factual question to require that the case be submitted to the jury. As this Court pointed *Pollerv. Columbia Broadcasting System*, 368 U.S. 464,(1969), summary disposition is disfavored in complex antitrust litigation.

It was error for the trial court to grant respondent's motion in reference to the 1969 contract. By doing so, that court came squarely in conflict with the *Fortner* line of cases.

The instant case in reference to the making of the 1971 amendment, also presents a tie-in violation under the traditional scheme set forth in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958) in which this court affirmed the trial courts finding of a per se tying violation. In discussing the case, the Court said:

> They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayne Publishing Co. v. United States*, 345 U.S. 594 606.
>
> 356 U.S. at 6.

In the instant case, the testimony showed clearly that the 1971 amendment foreclosed competitors from the market. Respondent simply raised prices on the old lines of tires to allow it to sell the new lines at prices which competitors could not meet. Because the Petitioners' need for the new lines, it had no "free choice" between competing products, since the 75% clause made it impossible for them to go to competitors of Respondent for purchases.

In short, Uniroyal, which had been one of several suppliers for the Delta group, under the guise of providing low prices on the old lines of tires for five years, lured the members of Delta into the five year contract--with a catch. The catch was that for five years the members had to buy 75% of their Delta brand tires from Uniroyal including new lines at open and prices. The anti-competitive purpose of the contract was immediately achieved as Firestone dropped its bid for the Delta business. Uniroyal, locked in as the major supplier, quickly sought to increase the low prices on the old lines under its threat to raise prices on the new lines. The threat --a sophisticated form of economic coercion applied by Uniroyal by virtue of its 1969 contract power over the tied product--worked and the 1971 amendment was signed. The Delta group, by contract, became a captive of its supplier who utilized such power to produce the desired anti-competitive result. Uniroyal also competes in the private brand market with its own "Gillette" brand tire and thus the higher cost to Delta could inure to Uniroyal's benefit in its Gillette program. In any event, the 1969 contract with the 1971 amendment proved economically disastrous for the plaintiffs.

The 1969 contract and 1971 amendment constituted a tie-in. It was error for the trial court to grant Respondent's motion on such basis, and that ruling conflicts with decisions of this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

EDWARD LEE HICKS and DELTA DISTRIBUTING CO., INC., a Texas Corporation,

Plaintiffs

v

UNIROYAL, INC.,

Defendant.

JUDGMENT

On the 16th day of June, 1975, the above cause came on for trial in the regular course of the Court's docket. Plaintiffs Edward Lee Hicks and Delta Distributing Co., Inc. (which is one and the same as Delta Distributing, Inc.) appeared by and through Edward Lee Hicks and their attorneys of record and Defendant Uniroyal, Inc. appeared by and through its attorneys of record. All parties announced ready for trial. Thereupon a jury of twelve good and lawful persons was duly impaneled and sworn and after presentation of opening arguments by all parties, the plaintiffs presented their evidence.

After the Plaintiffs had rested on the 20th day of June, 1975, the defendant made its motion for a directed verdict. The Court was of the opinion that such motion

for directed verdict should be granted and that judgment should be entered as a matter of law that plaintiffs take nothing by their claims against the defendant herein and that the defendant be discharged with its costs. The Court therefore instructed the jury to return a verdict for the defendant in all respects, and the jury did return a verdict for the defendant in accordance with such instruction. It is therefore

ORDERED AND ADJUDGED AND DECREED that Plaintiffs Edward Lee Hicks and Delta Distributing Co., Inc. (one and the same person as Delta Distributing, Inc.) take nothing against Defendant Uniroyal, Inc., that the action be dismissed on the merits, and that Defendant Uniroyal, Inc. recover of the Plaintiffs Edward Lee Hicks and Delta Distributing Co., Inc. (one and the same person as Delta Distributing, Inc.) its costs of action.

SIGNED, RENDERED AND ENTERED this 17th day of July, 1975.

/s/ _____
United States District Judge

* * *

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-3407

EDWARD LEE HICKS, ET AL.,
Plaintiffs-Appellants

versus

UNIROYAL, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(April 29, 1976)

Before: GEWIN, GODBOLD and SIMPSON, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21[1/]. Costs are taxed against plaintiff-appellants.

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

Issued as mandate:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-3407

EDWARD LEE HICKS, ET AL.,

Plaintiffs-Appellants,

versus

UNIROYAL, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern district of Texas

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ON PETITION FOR REHEARING

(June 9, 1976)

Before: GEWIN, GODBOLD and SIMPSON, Circuit Judges

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is here by denied.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-3407

EDWARD LEE HICKS and
DELTA DISTRIBUTING COMPANY,
A Texas Corporation
Plaintiff-Appellants,

v

UNIROYAL, INCORPORATED,
A Delaware Corporation,
Defendant-Appellee.

Appeal From the United States District Court for the Northern District of Texas

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PETITION FOR REHEARING BY APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 40, Plaintiff-Appellants Hicks and Delta Distributing Company request Rehearing of this Court's judgment (Fifth Circuit Rule 21) affirming a directed verdict for the Defendant based upon both lack of standing and the establishment of a tie-in violation under Section 1 of the Sherman

Antitrust Act. Judgment entered April 29, 1976; Appellants obtained extension of time to file Petition for Rehearing.

GROUNDS FOR REHEARING

Federal Appellate Rule 40 requires the Petition to state with particularity the points of law "the court has overlooked or misapprehended." Although it is surmised that the affirmance was because of the standing issue, because this Court affirmed pursuant to Rule 21, the Rule 40 requirement, of necessity, must be couched in light of the dual grounds of the trial court's ruling of standing and tie-in.

Rehearing should be granted as:

(1) The Plaintiffs Hicks and Delta Distributing have standing to assert that the various contractual arrangements concerning the rights and obligations to manufacture, sell and buy different lines of tires, between Defendant Uniroyal, the Delta Tire Corporation and the individual members of Delta Tire Corporation, including Plaintiff Delta Distributing Act, notwithstanding that the actual purchase of tires made pursuant to Delta Distributing's contractual rights were by entities owned, controlled, or sub-franchised by the Plaintiffs Hicks and Delta Distributing.

(2) Fifth Circuit Rule 21 affirmance is not appropriate in the present proceeding, as the legal authority expressly acknowledged by the trial court in granting Uniroyal's motion for directed verdict is not applicable to the legal question presented in the case at bar, and it is

constitutionally not desireable to affirm a judgment that was predicated upon both a jurisdictional ground and the merits of a case under a significant federal law.

ARGUMENT IN SUPPORT OF REHEARING

A. Standing

Although the precise basis of this Court's affirmance is not known, based upon oral argument, it would appear to be lack of standing. Apparently, the reason for lack of standing is that the actual purchases of Uniroyal were made by entities owned, controlled, or franchised by the plaintiff. It is the position of the Plaintiffs that actual purchases by them are not a prerequisite to standing as this was not the basis of the loss caused by the antitrust violation for which damages were sought.

There are two basic reasons why the Plaintiffs have standing in the case at bar. First, the right and property interest of the Plaintiffs was not merely the right and duty of Delta Distributing to purchase tires but the right to sub-franchise, for valuable consideration, other individuals or entities to buy Delta brand tires for resale through wholesale and retail outlets of the sub-franchisee, or the right to sell or lease, for valuable consideration, the entire franchise rights of the Plaintiffs. Second, the damages sought were in reference to the marketable value of the right to buy Delta brand tires and the decrease in such value that was caused by the five year illegal tie-in contract with Defendant, Uniroyal.

Thus, the standing question at bar cannot be fairly analyzed to be a single uncomsumated offer for a tie-in sale, as would be the situation, for example, where Able offered to sell to Baker product X but only on an illegal tie-in that Baker also buy product Y and Baker refuses so no sale is made. Whether or not "Baker" would have standing may in itself be an interesting question, but does not resolve the present case because Delta Distributing rights to buy Delta tires and/or sell this right to others was subject to a continuing contractual obligation for five years to buy the tying product and the tied product. It was this continuing contractual obligation "to buy" and to buy in the future for the life of the contract which decreased the value of the Plaintiffs' franchise and caused the injury to the Plaintiffs' business and property. This is fully reflected in the evidence, which established, for purposes of a directed verdict, the following:

(1) Prior to the impact of the 1969 contract and 1971 amendment between Plaintiff Delta Distributing and Defendant Uniroyal, the Delta Franchise for 191 Texas counties (owned by Delta Distributing and Hicks) was worth one million dollars or more (the Florida franchise, comparable in market potential, had been leased for $5,000.00 a month for 20 years; Hicks had actually sold some sub-franchise in Texas for substantial sums);

(2) After the impact of the 1969 contract and the 1971 amendment between Plaintiff Delta Distributing and Defendant Uniroyal, the Plaintiffs' Texas Delta Franchise decreased in value to the extent that

it was sold for $150,000.00. (Testimony was adduced from Hicks, Oliver, and another witness that the decrease in value was the result of the contractual tie-in arrangements between Defendant Uniroyal and Plaintiff Delta Distributing).

Plaintiffs business has been injured to the extent of over one million dollars of damages. Because that injury was caused by an alledgedly illegal tie-in contract between Plaintiff Delta Distributing, Defendant Uniroyal (and others), the Plaintiffs have standing to present such claim for damages for appropriate determination on the merits.

There can be no doubt that a franchise right is a valuable property right that can be adversely affected by a tie-in. Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Circuit 1971). Under principles recognized by the Supreme Court, Hicks and Delta Distributing have standing. Perkins v. Standard Oil, 395 U.S. 642 (1969). cf. Assn. of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

The measure of damages predicated upon a decrease in the value of the business is proper in antitrust cases, and in particular the difference between what the business sold for and what it would have sold for absent the antitrust wrong. Story Parcment Co. v Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974); Gleason v. Title Cty Co., 300 F.2d 813 (5th Cir. 1962).

B. Fifth Circuit Rule 21

At the outset Appellants would stip-

ulate: (a) That Rule 21 is a fair and appropriate solution to the compelling need and urgency to resolve the problems which necessarily result from a staggering appellate case load; and (b) that Rule 21 affirmances are the result of the same careful judgment, review and consideration which is given to cases which are disposed of by opinion; and in particular that although this panel did not write an opinion, this panel fully and fairly considered the case, and indeed, not only adroitly questioned counsel at oral argument, but also allowed counsel to file a post argument brief for due consideration.

The Appellants would, however, respectfully suggest that Rule 21 is not appropriate to the present case in which a directed verdict was granted in a federal antitrust case on the basis of standing and the merits of a tie-in violation, and in particular where the acknowledged authority for lack of standing is not applicable.

Standing is, or course, a Constitutional requisite under Article III, and if standing fails, the Court has no jurisdiction to consider the merits of the claim as advisory opinions are also outside the purview of Article III Courts. If the decision to affirm by this Court is because of lack of standing, it should be so expressed, although of course, on this issue the Appellants have contended (rather unsuccessfully to date) that they clearly have standing. If the decision is in reference to legal questions concerning a tie-in, it should be noted that the Supreme Court has again granted certiorari in U.S. Steel Corp. v. Fortner, ____U.S.____, 96 S.Ct. 1100 (Feb.

23, 1976). If a matter is important enough for the Supreme Court to grant certiorari, it could be suggested that a Rule 21 disposition should be reconsidered.

The trial court expressly relied upon Mendenhall v Flemming, 504 F.2d 879 (5th Cir. 1974). That case held that a former shareholder of a corporaiton does not have standing to sue for damages resulting from a defendant's antitrust wrongs against the corporation. Appellants have no quarrel with the Mendenhall case; it simply does not govern, and Uniroyal's use of it as authority is, at best, a classic example of circuitous reasoning. Uniroyal argued that Delta Distributing could not recover because it was Hicks that received or controlled the proceeds from the sale of subfranchise. Uniroyal then, in turn, argued that Hicks does not have standing because he was (and is) a controlling shareholder of Delta Distributing, citing Mendenhall. Hicks, of course, was joined as a Plaintiff because he did receive the proceeds on the sale of the subfranchises and not because he was a shareholder. The question is not whether Delta Distributing or Hicks individually have standing, but whether they jointly have standing. It is difficult to conceive that this Court would buy Uniroyal's argument that Mendenhall is, or could be, controlling of the standing issue in the case at bar.

Uniroyal apparently does not wish to contend that no one would have standing by implying that the entities controlled by Hicks or the sub-franchises who actually purchased tires might have some claim. This suggestion exists of course only because

such entities are not suing Uniroyal. The illegal tying agreemtn was the 1969 contract and the 1971 amendment. These other entities were not a party to such contract, and it would seem that a sub-franchisee who was not a party to the tie-in contract would have greater standing problems suing for an illlegal tie-in between Uniroyal and franchisee Delta Distributing than Delta should. In any event, because of the vast number of distribution systems that utilize franchises and subfranchises, a decision by this Court to clarify the constitutional standing issue could be of vase importance. This is particularly true in antitrust cases because the Supreme Court has consistently recognized the public policy in favor of such actions. See e.g., Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318. The case itself involves one of the largest manufactures of tires in the United States. The Delta group is the largest private brand account of Uniroyal. Twenty-one entities besides Delta Distributing are contractually bound by the same alledgedly illegal tie-in contracts. Other contracts of a realted nature may be utilized depending on the legality of the present contract.

As this Court appreciates, the issues in this case do not come within the scope of Fifth Circuit Rule 21 (1),(2) and (3). In reference to Rule 21 (4), the constitutional issue of stanidng and the legal issues under the Sherman Antitrust Act are of substantial public importance and would be of great recedential significance.

CONCLUSION

Appellants' Petition for Rehearing should be granted and the cause below reversed and remanded for new trial. In the alternative this Court should clarify the basis of its affirmance.

* * *

EXCERPTS FROM 1969 CONTRACT-PLAINTIFF'S EXHIBIT NO. 5

A G R E E M E N T

AGREEMENT made and entered into this 11th day of September, 1969, by and between DELTA TIRE CORPORATION, a Michigan corporation, with its principal offices at 25625 Southfield Road, Southfield, Michigan 48075 (hereinafter called "DELTA"), the shareholders of DELTA listed on Exhibit A, annexed hereto, who are signatories hereto (hereinafter collectively called "Members") and UNIROYAL, INC., a New Jersey corporation, with its principal office at 1230 Avenue of the Americas, New York New York, 10020 (hereinafter called "UNIROYAL").

W I T N E S S E T H:

WHEREAS, DELTA has created and owns the brand names "Delta" and "Victorian" as used on automotive tires and may, in the future, create and own other brand names for use on automotive tires (automotive tires bearing said present or future brand names hereinafter called "Delta tires"), and

WHEREAS, DELTA coordinates the purchases of Delta tires and tubes for the Members, and it is the desire of the parties that UNIROYAL shall manufacture and sell to the Members a certain percentage of the total requirements of the Members of each line and type of Delta tires listed on Exhibit B annexed hereto, and such quantities of the line and type of

tubes listed on Exhibit B as the Members may order, upon the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the premises and the mutual promises hereinafter set forth, the parties hereto agree as follows:

* * *

1. Quantities.

(a) UNIROYAL will manufacture, sell and deliver to each member and each member will purchase and receive from UNIROYAL during each twelve (12) month period beginning July 1, 1969, 75% of the total requirements of each emmber of each line and type of Delta tires listed on Exhibit B and such quantities of the line and type of tubes listed thereon as each Member may order from time to time; provided, however, that UNIROYAL shall not be required during any calendar month to manufacture or deliver more than 150% of the average number of Delta tires and tubes shipped per month to the Members as a group during the six (6) preceding months.

(b) In the event DELTA shall desire a line or type of tire or tube not listed on Exhibit B (in this ¶ 1 (b) called "new line"), it shall so notify UNIROYAL. UNIROYAL shall have the option to manufacture the new line for DELTA and the Members. Said option shall be exercisable by UNIROYALS written notice to DELTA OF its intention to do so within 90 days subse-

sequent to receipt by UNIROYAL of DELTA's notification. If UNIROYAL shall exercise said option, the new line shall be deemed added to Exhibit B and subject to the terms and provisions of this Agreement, provided that UNIROYAL and DELTA shall agree on the prices therefore to be in included in Exhibit B. If UNIROYAL does not exercise said option, or, if having exercised said option UNIROYAL and DELTA fail to agree on the prices therefore, DELTA shall have the right to have the new line manufactured elsewhere, provided, however, that in such event the purchases required pursuant to ¶ 1 (a) shall be increased to the extent necessary to bring the total number of Delta tires purchased by each Member from UNIROYAL to a level of at least 75% of the Member's total unit purchases of Delta tires, whether or not listed on Exhibit B."

(d) DELTA shall notify UNIROYAL when any Member is no longer a shareholder of DELTA and when any person, firm or corporation has become a shareholder of DELTA. DELTA and the Members agree that no person, firm or corporation shall become a shareholder of DELTA unless such person, firm or corporation shall agree with UNIROYAL to be bound by the provisions of this Agreement.

2. Processing Of Orders

All orders of the Members for

Delta tires and for tubes under the provisions of this Agreement shall be submitted by DELTA to UNIROYAL and shall be processed only through the principal office of DELTA. All shipments shall be made by UNIROYAL to the respective Members and not to DELTA.

3. Obligation For Payment

DELTA shall not be obligated or responsible to UNIROYAL, directly or indirectly, as obligor, surety, guarantor, or in any other manner, for the payment of any tires or tubes shipped by UNIROYAL to the respective Members. UNIROYAL agrees to send its invoices for such shipments directly to the respective Members and to send copies thereof to DELTA. No Member shall be obligated to pay for any tires or tubes ordered by any other Member or Members. In the event a Member fails to make payment for such shipments in accordance with the terms hereinafter provided for, UNIROYAL shall have, in addition to all rights provided by law, the right to make subsequent shipments to such Member on a collect on deliver basis.

EXCERPTS FROM 1971 AMENDMENT PLAINTIFF'S EXHIBIT NO. 2

"4. Paragraph 1 (b) of the Agreement is hereby amended by deleting the test thereof and substituting in lieu thereof;

In the event DELTA shall desire a line or type of passenger or truck tire not listed on Exhbiti B (in this Paragraph 1 (b) called "new line"), it shall so notify UNIROYAL. UNIROYAL shall have the option to manufacture the new line for DELTA and the Members. Said option shall be exercisable by UNIROYALS'S written notice to DELTA of its intention to do so within ninety (90) days subsequent to receipt by UNIROYAL of DELTA's notification. If UNIROYAL shall exercise said option and (i) if in UNIROYAL's reasonable opinion the new line is comparable in construction and design to a line of tire listed on Exhibit B, the new line shall be added to Exhibit B, in the case of a new line of passenger tires, at a price for each size of the new line equal to he price of the equivalent size of the Delta 178 2+2 R.R. and, in the case of a new line of truck tires, at a price for each size of the ne line equal to the price of the equivalent size of the Delta Deep Lug, plus or minus the product obtained by multiplying said price by a percentage equal to the percentage of increase or decrease in the cost to UNIROYAL to manufacture the new size as compared

with the cost to UNIROYAL to manufacture the equivalent size of the Delta Deep Lug, and (ii) if in UNIROYAL's reasonable opinion the new line is not comparable in construction and design to a line of tire listed on Exhibit B, such as, but not limited to, steel belted tires, radial ply tires and racing tires, and UNIROYAL and DELTA shall agree on the prices therefor, such prices and the new line shall be added to and included in Exhibit B. If UNIROYAL does not exercise said option, or, in the case of a new line of the type referred to in (ii) above and UNIROYAL and DELTA fail to agree on the prices therefore, DELTA shall have the right to have the new line manufactured elsewhere.